licence or advance fixing certificate may not obtain a new licence or equivalent document permitting him to carry out the export operations on the conditions laid down in the stolen licence or certificate.

2. Consideration of the provision in question has disclosed no factor of such a kind as to effect its validity.

Kutscher O'Keeffe Touffait Mertens de Wilmars Pescatore

Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 26 June 1980.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 22 MAY 1980 [1]

Mr President,
Members of the Court,

Article 12 of Regulation No 2727/75 on the common organization of the market in cereals (Official Journal L 281, p. 1, of 1 November 1975) provides that exports from the Community of any of the products listed in Article 1 shall be subject to the submission of an export licence which may be issued by Member States to any applicant irrespective of the place of his establishment in the Community. Such a licence is valid throughout the Community. The issue of such a licence is conditional on the lodging of a deposit, guaranteeing that exportation will be effected during the period of validity of the licence (fourth subparagraph of Article 12 (1)). Article 16 of that regulation provides that in order to enable the products listed in Article 1 to be exported on the basis of quotations or prices for those products on the world markets, the difference between those quotations or prices and prices in the Community may be covered by an export refund. The refunds, which are the same for the whole Community, are fixed at regular intervals in accordance with the procedure laid

1 — Translated from the German.

down in Article 26. On exportation the amount of the refund applicable on the day of exportation is to be applied. However, in the case of products listed in Article 1 (a) and (b), the refund applicable on the day on which the application for the licence is lodged, adjusted for the threshold price which will be in force during the month of exportation, is to be applied to an export to be effected during the period of validity of the licence if the applicant so requests when applying for the licence (Article 16). Where the refund is fixed in advance, Article 12 of the regulation requires the advance fixing to be noted on the licence.

Detailed rules for the application of these provisions, which under Articles 12 and 16 of Regulation No 2727/75 have to be adopted in accordance with the Management Committee procedure, have been laid down in regulations made by the Commission (cf. Regulation No 192/75, Official Journal L 25 of 31 January 1975, p. 1; Regulation No 193/75, Official Journal L 25, p. 10; Regulation No 2042/75, Official Journal L 213, p. 5, of 11 August 1975). Article 9 of Regulation No 193/75 provides that licences and certificates shall be drawn up at least in duplicate. The first copy, called "Titular Holder's Copy" and marked "No 1", is to be issued without delay to the applicant and the second, called "Issuing Agency's Copy" and marked "No 2", is to be retained by the issuing agency. Article 9 goes on to provide that Copy No 1 "shall be submitted to the office responsible for completing ... in the case of an export licence or of a certificate of advance fixing of the refund, the customs export formalities". After attribution of the quantity and endorsement by the office referred to above, Copy No 1 of the licence or certificate is to be returned to the party concerned. Article 13 (1) of Regulation No 192/75 provides that the refund shall be paid on written application by the party concerned by the Member State in whose territory customs export formalities were completed. Article 13 (3) of that regulation provides that, except in cases of *force majeure*, no claim for payment of the refund shall be entertained unless the relevant documents are submitted within the six months following the date on which customs formalities were completed. Finally, Article 17 (7) of Regulation No 193/75 provides:

"Where a licence or certificate or extract therefrom is lost, issuing agencies may, exceptionally, supply the party concerned with a duplicate thereof, drawn up and endorsed in the same way as the original document and clearly marked with the word 'Duplicate' on each copy.

Duplicates may not be submitted for purposes of carrying out import or export operations."

The competent Italian agencies issued various export licences or certificates to the Pardini undertaking, the plaintiff in the main proceedings, in 1979. In one case it was a licence for the export of flour which was intended as food aid for the United Nations Relief and Works Agency; another case involved a certificate for the ordinary export of wheat meal. The latter fixed the refund in advance and referred to a quantity of 12 500 tonnes. It was dated 14 June 1979 and was valid until 31 October 1979.

It appears that these documents were stolen from a representative of the Pardini undertaking on 22 August 1979 in Rome. Pardini thereupon applied to the Italian Ministry for Foreign Trade for authorization to carry out the export

on the basis of new documents. As a result — obviously after consultation with the Commission — a fresh licence, valid until 31 December 1979, was issued on 27 August 1979 for the export by way of food aid. However, as regards the other document referred to, which was apparently intended for deliveries by Pardini to Algeria, the issue of a certificate corresponding to the original document was refused in reliance on the abovementioned Article 17 (7) or Regulation No 193/75.

Pardini, which, it seems, was prepared to deposit a security in the form of a bank guarantee equal to the amount of the refund fixed in advance, considers such conduct unlawful. It takes the view that the Italian authorities misinterpreted the said Article 17 of Regulation No 193/75; however, if this interpretation, to which the Commission also subscribes, is correct, it is submitted by Pardini that the provision should for several reasons be regarded as illegal.

Pardini has taken various steps to enforce its alleged rights. On 9 November 1979 it wrote to the Commission pursuant to Article 175 of the EEC Treaty and subsequently brought an action against the Commission for failure to act and claimed damages (Case 809/79, in which Pardini also applied, unsuccessfully, for the adoption of an interim measure). Further, it obtained from the Pretore, Lucca, in November 1979 an interim order for the issue of a replacement licence, which, however, the Italian Government did not comply with, although it appears that the case never got beyond the interlocutory stage. Finally, on 19 November 1979 Pardini submitted an application to the Tribunale di Lucca for the stolen licence to be declared void pursuant to Article 2016 et seq. of the Italian civil code.

The President of the Tribunale di Lucca stayed the last-mentioned proceedings by an order of 28 November 1979 and referred the following questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

"1. Must the first and second subparagraphs of Article 17 (7) of Regulation No 193/75 be interpreted as meaning that an exporter who has suffered the theft of an export licence or certificate, valid throughout the Community, fixing in advance the amount of the refunds, may not request and obtain a new licence or certificate or equivalent document issued by a national authority permitting him to carry out the export operations before or after the expiry of the period of validity of the stolen document, thus suffering the total loss of the refunds fixed in advance under the said document?

2. In the event of an affirmative answer to the previous question, is Article 17 (7) of Regulation (EEC) No 193/75, which imposes a very severe penalty upon an exporter who, without any fault on his part, has suffered the theft of an export licence or certificate, compatible with the principle of proportionality in the light of the decision of the Court of Justice, bearing in mind that the disputed regulation is a regulation of the Commission and not a regulation of the Council of Ministers of the EEC?"

My opinion on these questions is as follows:

1. The first question

The plaintiff in the main proceedings takes the view that the provision in question does not apply to the loss of a licence or certificate through theft. In support of this view, it points out, citing numerous examples, that the national legal systems make a clear distinction between loss and theft, and it claims in particular that such an interpretation is suggested by the wording of Article 17 (7), since "loss" describes an occurrence which depends solely on the conduct of the owner. It further emphasizes the need for such a narrow construction of the said provision in view of the serious consequences which it entails and in consideration of the fact it contains a derogation from the principle that, in general, copies have the same value as originals. This must also apply to export licences, it is argued, since they do not embody the right to export but should merely be regarded as authenticating papers which are supposed to denote the person entitled and certify that the conditions for the performance of an export transaction are satisfied. It must also be borne in mind, according to the plaintiff, that Article 17 of Regulation No 193/75 is concerned above all with the fate of the security deposited, that is to say it is designed to deal with undertakings which are concerned only with the release of the security and which had absolutely no intention of carrying out the transaction for which the licence was valid. Another important factor according to the plaintiff is that the serious legal consequences laid down by Article 17 (7) of Regulation No 193/75 are not necessary in the event of a theft. Whoever relies on theft must report the matter to the authorities charged with enforcing the criminal law, and it must be assumed, since the making of false reports is punishable, that reports are made only when it really is a question of theft and not a loss due to other causes. Further, on account of the terms of Article 3 of Regulation No 193/75 (transfer to another person only on application of the titular holder and through the agency which issued the document), a stolen licence or certificate made out to the holder may not be used by another person. Therefore if a second licence or certificate is issued, the danger that it may be used twice exists only in the event of forgeries, for which however other provisions are laid down in Articles 13, 15 and 16 of Regulation No 193/75 and which may also be discouraged by the threat of serious penal consequences in the national legal systems. However, as regards the possibility that a theft might merely be feigned and that the licence holder himself might intend to use the licence twice, such a plan would encounter considerable difficulties where, as in the present case, large quantities are involved for which alternative sources and alternative customers could not be found as a matter of course; also, in a case such as this, in which the plaintiff has drawn attention to itself through five legal actions and in which, first, the period of validity of the original licence has already expired, and, secondly, the period laid down in Article 13 of Regulation No 192/75 was also about to expire at the time of the oral procedure, such devices, which have clearly never been practised in the past, could be brought to light by inspections.

The Commission, on the other hand, in an apparent reference to the serious

consequences which the plaintiff fears might ensue if Article 17 (7) of Regulation No 193/75 were to be construed widely, points out that exports may be effected even after the loss of a licence, either subject to the refund rate obtaining on the day of the export or, if this is permitted by the new licence, subject to a new refund rate fixed in advance. Above all, the Commission states, in view of the sense and purpose of the provision the term "loss" must be deemed to embrace thefts. Otherwise all, or at least very many, losses would be declared as thefts, for which it would merely be necessary to make a report, the veracity of which would be difficult to disprove. Moreover, there exists the danger, which could only be countered by laborious controls, that the holder of a licence might be feigning loss or theft effect an export transaction governed by advantageous conditions twice over and thus influence the market in an uncontrolled manner.

Admittedly, as far as this issue is concerned, it must be granted that a literal interpretation of the provision in question and a comparison with certain national rules appear to suggest that the term "loss" does not include theft. However, that consideration alone cannot be decisive.

If other considerations raised in the proceedings are reflected upon, it quickly becomes apparent that it is not possible to uphold the plaintiff's wider argument to the effect that Article 17 of Regulation No 193/75 essentially concerns only questions relating to the forfeiture of the security, that is to say, circumstances in which the intention to effect an export transaction no longer exists at all, whereas no provision is made for cases in which after the loss of a licence such intention still exists. That argument is clearly contradicted by the second subparagraph of Article 17 (7) of Regulation No 193/75, which provides that a duplicate issued in the event of loss may not be submitted for purposes of carrying out import or export operations. Here it is a question of legal effects which clearly go beyond the forfeiture of the security; obviously this provision presumes a continuing intention to carry out an export transaction, because otherwise a rule that imports and exports could not be carried out with the aid of a duplicate licence would be pointless.

It must also be borne in mind that acceptance of the narrow construction of Article 17 (7) advocated by the plaintiff would lead to the conclusion that the provision is imcomplete because no provision is made for the event of theft. Nor do we receive any help in this regard from Article 20 of Regulation No 193/75, which deals with *force majeure*, since that provision — in so far as its content is relevant to this matter — speaks only of an extension of the period of validity of a licence or certificate, but does not say that this may be done in the case of a duplicate. On the other hand, it seems erroneous to refer in cases of theft to the general law, and the possibility to be deduced from it of issuing substitute documents. Apart from the fact that it appears problematical simply to transpose the national rules of law referred to by the plaintiff, whereby copies may have the same effect as originals, to Community law on inter-

national trade with its special problems and requirements, and apart from the fact that a special treatment of cases of theft as against all other cases of loss (for example, cases in which there is a complete absence of fault) does not seem appropriate, such a course would lead to an extensive erosion of the substance of the provision contained in Article 17 (7) of Regulation No 193/75, as strictly construed. Indeed, it cannot be denied that a narrow construction of Article 17 (7) would inevitably entail a strong tendency for losses to be declared as thefts in order to avoid the legal consequences of the second subparagraph of Article 17 (7), which would not be particularly risky since — as will be shown later — the difficulty of carrying out effective controls practically excludes the possibility of false reports' being discovered.

If it is therefore tempting to follow the interpretation recommended by the Commission, based on the sense and purpose of the provision, and thus understand by "loss" every type of incident in which the holder becomes dispossessed of his licence, including incidents involving the participation of third parties, it is not possible either to object to that view on the grounds that the legal consequence prescribed by Article 17 (7) of Regulation No 193/75 does not appear absolutely necessary in the event of a theft. Admittedly it may be argued that in the event of a genuine theft the danger of the authorized transaction being carried out twice by a third person or by the original holder of the licence or certificate with the aid of a copy is relatively slight. In view of the formal requirements, already referred to, laid down by Article 3 of Regulation No 193/75 (collaboration of the original holder of the document and the issuing agency in changing the name) it would be possible only by means of a forgery, that is to say in a way which in view of the special provisions of Articles 13, 15 and 16 of Regulation No 193/75 and in the light of the strict provisions of national criminal law may probably be discounted. Similarly, precisely on account of the requirements of Article 3 of Regulation No 193/75 and the consequent possibility of detection, the risk that the holder of a licence or certificate feigning a theft would use a copy himself and allow the original document to be used by another person may be regarded as relatively slight.

However, we must not overlook — and this was probably uppermost in the minds of the legislature — the risks for the working of the common organizations of the agricultural market, given the absence of any reliable supervision over market operations and the direct influence on the market of unrecorded transactions. Such risks might be expected to arise if a theft were feigned and both the original licence or certificate and a copy thereof were used by the holder himself in several member countries. In spite of possible variations in market conditions in the different Member States such a temptation might exist in several contingencies, for example where certificates with advance fixing of refunds at advantagous rates are issued and the refund is later reduced or, as in the present case, abolished, and also in cases in which, after the licence or certificate is obtained, the issue of such documents is suspended altogether, as well as in situations in which the issue of licences or certificates is made subject to onerous conditions, such as the purchase of products from Community intervention agencies.

These considerations cannot be countered by pointing out that the manoeuvres apprehended by the Commission have practically never occurred in the past, since that is clearly explained by the fact that the Community provision does not permit the issue of copies having the same value. Nor is it possible to call in aid the particular circumstances of the present case, in which a licence for a considerable quantity of goods is involved and in which the existence of a multiplicity of legal actions may have aroused the special attention of the agencies involved; for in performing the task of interpretation with which we are now faced it must be borne in mind that Article 17 (7) of Regulation No 193/75 amounts to a general rule, applicable to all cases, which does not of course permit distinctions of the sort that the plaintiff in the main proceedings has in mind. Finally, it is not possible to object either that the risk referred to is quite minimal on account of the danger that unlawful dealings might be detected and so attract penalties under national law. For such activities to be discovered effective controls would be required; but such controls — the matter will be dealt with in connexion with the second question — are practically impossible in view of the enormous number of operations which would have to be taken into consideration and on account of the periods of time involved (I refer here to the period laid down by Article 13 of Regulation No 192/75).

Therefore, one can only endorse the interpretation advocated by the Commission, which rests convincingly on the sense and purpose of the provision, and state in answer to the first question from the Tribunale di Lucca that the term "loss", contained in Article 17 (7) of Regulation No 193/75, includes theft.

2. The second question

If Article 17 (7) of Regulation No 193/75 is to be construed in the manner which I consider to be correct, it becomes necessary to examine its validity, first with regard to the question whether without being expressly so authorized by a specific provision of the relevant Council regulation, a Commission regulation such as Regulation No 193/75 may declare a right existing under the Council regulation to be extinguished, and secondly with regard to the question whether the legal consequence prescribed by Article 17 (7) of Regulation No 193/75 (that a duplicate issued in the event of loss may not be used for import or export operations) is compatible with the principle of proportionality.

(a) As regards the first point, the plaintiff in the main proceedings points out that under the relevant basic regulation of the Council (Regulation No 2727/75) every person concerned is entitled to claim authorization to carry out export and import transactions. Under the system used in the common organization of the market a clear distinction must be drawn between the right to carry out an export or import transaction and the document which serves as proof of that right, that is to say, which must be regarded as an authenticating document. But the Council regulation, it is claimed, merely empowers the Commission to deal with questions of form and lay down detailed rules for the application of the regulation. Where it is a question of an authorization going beyond those bounds, such as the authorization to determine the period of validity of licences or certificates, which affects the existence of the right as such, express provision is made for that (Article 12 of Regulation No 2727/75). In view of these considerations

the plaintiff claims that it cannot be accepted that the Commission is authorized to provide that the loss of a licence, that is to say an authenticating document, shall entail the loss of the right to perform the export or import transaction in question.

Although this line of argument may appear impressive at first sight, it must none the less be rejected. In my view the distinction between the right to export and the document proving that right is contrived. This area of Community law is — even under the basic regulation of the Council — necessarily formalistic in view of the multiplicity of such transactions and the requirements of the administration. In this respect previous decisions of the Court may be cited (Case 25/70 *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* v *Köster, Berodt & Co.* [1970] ECR 1161, at p. 1175), where it was said that the *licences* involved their holders in an undertaking to act in accordance with them. Hence there is an inseparable connexion between the attesting document and the obligation arising thereunder, which must also apply to the other aspect of the matter, namely the rights conferred upon the importer or exporter. In fact is is only in that way that the sense and purpose of the provision may be attained, namely to ensure a reliable monitoring of movements of goods and prevent uncontrolled transactions which might influence the market or, under certain circumstances, disturb it.

If therefore under the basic regulation of the Council the adoption of detailed rules for the application of the regulation and the settling of questions of form and procedure are left to the Commission, which, moreover, must act in accordance with the Management Committee procedure, that is to say with the participation of representatives of the Member States, this must, for the sake of the efficient working of the system, be taken to mean that the rule-making authorization extends to the question as to what should happen when mishaps, such as the loss of documents authorizing an export transaction, occur in this field. The assumption that the expression "detailed rules for the application" of the regulation includes the securing of effective supervision is clearly in accordance with the Council's views on Article 17 (7) of Regulation No 193/75, simply because there has been no reaction in this field from the Council or the Member States, which, as I have said, are represented on the Management Committee. In any event it is difficult to conceive that it is to be inferred from Article 12 of Regulation No 2727/75, which deals with the fixing of the period of validity of licences, that the intention was for other enabling provisions to be construed narrowly, and that there is therefore no authority to make rules governing the consequences of the loss of an import or export document. That would mean that the Council considered a serious lacuna in this regard acceptable. Or it would have to be taken that the Council acted on the assumption that in the event of the loss of an export or import document a second equally valid document could simply be issued in accordance with the general principles of the legal systems of the Member States. Both propositions are difficult to accept, the latter one in particular in view of the serious risks connected with it, which could only be excluded by effective control mechanisms, which however, as we have heard, the Member States have hitherto not been prepared to accept because they would cast a heavy burden on their administrative machinery.

Therefore, I take the view that the validity of Article 17 (7) of Commission Regulation No 193/75 cannot be called

in question on the ground that the Commission thereby exceeded the bounds of the authority conferred upon it by the Council.

(b) It is still necessary to consider whether any doubts about Article 17 (7) of Regulation No 193/75 arise on account of an infringement of the principle of proportionality.

The plaintiff in the main proceedings argues that export licences should merely be regarded as evidential documents. But, it is claimed, there is a general principle of law that when such a document is lost the necessary proof may be admitted in another form; in fact there are even legal rules which provide for the issue of replacements for documents which embody a right. Accordingly, the legal consequence prescribed in Community law when a licence or certificate is lost must be regarded as excessive. Moreover, it must be recognized that the aim of preventing misuse — simultaneous use of a copy and the allegedly mislaid original document — may also be attained in a less drastic way. That aim may be accomplished — as previous, not so alarming experiences have shown — by the penal provisions available in national law and by the fact that such dealings may be detected by appropriate controls. It would also be possible to consider — though only where gross negligence on the part of the holder of the document had led to the loss — making the issue of a copy which could fully replace the original, where there is an intention to export, subject to the lodging of a security to the amount of the refund originally stipulated.

In answer to these arguments the Commission points above all to the function of the licensing system, which has already been mentioned, and suggests that acceptance of the plaintiff's submission would entail the danger that losses would simply be reported as thefts. This would lead to a multiplicity of problematical situations which have hitherto only rarely arisen, precisely because of the existing rule. This could only be countered by effective controls when copies of licences or certificates are issued, since after all the deterrent effect of penal provisions depends on that. But, because it is a question of a general rule valid for imports and exports, applying to levies and refunds, that constitutes a problem on an enormous scale. Thus it should be borne in mind that a multiplicity of national agencies in the various Member States are involved in the handling of such operations, that each one has to deal with many such files and that in view of the time-limit laid down by Article 13 of Regulation No 192/75 effective supervision would in certain circumstances have to cover a considerable period. Therefore with the method used at present — there are only manual records — effective controls would require a huge administrative operation involving heavy expenditure, which the Member States have thus far not been prepared to accept, even after years of discussions about the problem.

I must say that these observations on the part of the Commission, and its comments with regard to an exception apparently operated from 1971 to 1973, which revealed the difficulties inherent in the requisite controls, have completely convinced me. In fact, the decisive test for determining the proportionality of

the legal consequence prescribed by Article 17 (7) of Regulation No 193/75 is whether the alternative solution advocated by the plaintiff — issue of an equally valid copy, at least in the event of theft — would not risk a considerable impairment of the Community system. Such a danger, arising from the double use of licences, should certainly not be under-estimated (in view of the rules in force it does not seem very useful to refer to previous experience in this matter), especially when it is remembered that many cases of loss, which may occur easily in view of the involvement of several persons acting on behalf of the undertaking, would become thefts, if the issue of copies of licences or certificates were permitted in such cases. In order to exclude that danger reliable controls would be necessary, but, as we have been shown, that would involve the national administrative agencies in enormous, unjustifiable expenditure.

Nor is it possible to accept a different solution if consideration is given to the possibility of sending export licences or certificates back to the issuing authority for the purpose of control. That would not help if a dishonest trader decided to forego the release of the security lodged by him, which with a double export and corresponding profit is quite conceivable. Similarly, it is not possible to come to a different view in relation to the possibility suggested by the plaintiff of lodging a security equal to the amount of the refund, which moreover it considers justifiable only where a licence or certificate is lost as a result of gross negligence on the part of the holder. Even this solution entails the necessity, at some stage, namely after the expiry of the period laid down in Article 13 of Regulation No 192/75, of deciding on the release of that security. But that could only be done if it were established that use had not been made both of the original document and of the copy issued in place of it, that is to say in this case also the huge control mechanisms described by the Commission would have to be set in motion, and this would burden the administration in a manner difficult to support.

Therefore, in my opinion the validity of Article 17 (7) of Regulation No 193/75 cannot be called in question by relying on the principle of proportionality either. The other considerations advanced by the plaintiff in this connexion with reference to fundamental rights and discrimination do not in my view introduce further factors of any weight into this appraisal.

Therefore, the existing rule, even though it does not seem entirely satisfactory, must be applied, at any rate as long as it is not possible to alter the mechanisms of the market organization and the administrative machinery connected with it in a way which makes the necessary controls, perhaps with the help of data processing, less costly. Until then it is only possible — as apparently already happens in some Member States — to appeal to the commercial circles involved, in collaboration with the administrative authorities, where appropriate, to handle export and import licences and certificates with the greatest care.

3. Accordingly I propose that the questions submitted by the Tribunale di Lucca, be answered as follows:

(a) Article 17 (7) of Regulation No 193/75 must be interpreted as meaning that even an exporter from whom a certificate, valid throughout the Community, fixing in advance the amount of the refund, has been stolen may not claim a copy of the document which will entitle him to carry out the export transaction on the conditions laid down in the original.

(b) The proceedings have disclosed no factor of such a kind as to affect the validity of Article 17 (7) of Regulation No 193/75, as interpreted above.